Office-Supreme Court, U.S.
FILED
JUL 16 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1681

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

VILLAGE OF HOFFMAN ESTATES, ILLINOIS, et al.,

Appellants,

vs.

THE FLIPSIDE, HOFFMAN ESTATES, INC., an Illinois Corporation,

Appellee.

On Appeal From The United States Court Of Appeals For The Seventh Circuit

BRIEF AMICUS CURIAE OF THE VILLAGE OF WILMETTE, ILLINOIS, an Illinois Municipal Corporation

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INTRODUCTORY STATEMENT

This brief is filed pursuant to the authority granted by Rule 36(4.) of the Rules of the Supreme Court of the United States by the Village of Wilmette, Illinois, an Illinois municipal corporation. The Village of Wilmette is appearing as amicus curiae in support of the position

necessarily taken by the Appellant herein, the Village of Hoffman Estates, that municipalities may require those persons who sell drug paraphernalia items to obtain a license as a condition to do such business.

This brief is filed by the Village of Wilmette, an Illinois Municipal Corporation. Rule 36(4.) permits such filing without consent by ". . . a political subdivision of a State . . . sponsored by the authorized law officer thereof." The Village of Wilmette is such a political subdivision and the attorney herein is the duly appointed and acting Corporation Counsel of said municipal corporation.

The Corporate Authorities of the Village of Wilmette are deeply concerned with the issue in this case and the immediate effect on its citizens and, therefore, have authorized and directed the filing of this brief amicus curiae.

INTEREST OF THE AMICUS CURIAE

The Village of Wilmette, Illinois (hereinafter called "Wilmette") is a municipality with a population of approximately 28,000 persons. Wilmette is situated on the western shoreline of Lake Michigan, immediately north of the City of Evanston. Under the Illinois Constitution of 1970, Wilmette is a home rule unit of government.

Within Wilmette's boundaries there are four public elementary schools, one public junior high school, two parochial elementary schools, and two Catholic high schools. Within a mile of Wilmette's northern boundaries are two public high schools servicing New Trier Township, of which Wilmette is a part.

On December 16, 1980, the Corporate Authorities of Wilmette, acting in response to a strong community plea for regulation of persons then believed to be selling drug paraphernalia items in Wilmette, adopted Ordinance 80-0-50. This ordinance did not prohibit the sale of such items to persons 18 years of age or older, but the ordinance did require persons selling or offering to sell drug paraphernalia items to obtain a license from Wilmette and to maintain certain records.

In preparing Ordinance 80-0-50, Wilmette reviewed the drug paraphernalia ordinance adopted in February 1978 by the nearby Village of Hoffman Estates. As of December 1980, the Hoffman Estates ordinance had been found valid by the local United States District Court (*The Flipside, Hoffman Estates, Inc. v. Village of Hoffman Estates*, 485 F.Supp. 400 (N.D. Ill. 1980).) Although Wilmette did not follow *verbatim* the Hoffman Estates ordinance, it would be fair to say that the Hofman Estates ordinance served as Wilmette's "drafting model." (It should be noted that several other communities in the Chicago area also adopted licensing ordinances similar to the Hoffman Estates ordinance. Among these are the Villages of Skokie, Glenview and Winnetka.)

In January 1981, the United States Court of Appeals, Seventh Circuit, reversed the District Court's judgment in the *Hoffman Estates* case and held that the *Hoffman Estates* ordinance was unconstitutional on the grounds that the ordinance and the guidelines adopted in connection with the ordinance failed to adequately define the items to be regulated, thus leaving a retailer unable to determine what the law expected of him. In other words, the Hoffman Estates ordinance was declared void for vagueness. *The Flipside, Hoffman Estates, Inc. v. Village of Hoffman Estates*, 639 F.2d 373 (7th Cir.

1981) (hereinafter referred to as the "Hoffman Estates Case").

Promptly after the decision of the Seventh Circuit in the Hoffman Estates Case, Wilmette held further hearings in respect of its own ordinance. On April 7, 1981, Wilmette adopted Ordinance 81-0-12, which made substantial changes in the provisions of Wilmette's earlier ordinance. These changes reflected an effort by the Corporate Authorities of Wilmette to avoid the drafting infirmities which led the Seventh Circuit Court of Appeals to declare unconstitutional the Hoffman Estates ordinance.

The effect of Ordinances 80-0-50 and 81-0-12 was to amend the Wilmette Village Code by adding a new Chapter 11 thereto. Chapter 11 is attached to this brief as an Appendix.

Because of the position occupied by the Hoffman Estates ordinance in the development of Wilmette's drug paraphernalia ordinance, the decision of the United States Supreme Court to take the Hoffman Estates Case on appeal is of great concern to Wilmette. In filing this amicus curiae brief, Wilmette will not make any arguments directed specifically to the constitutionality of the particular ordinance which is the subject of the Hoffman Estates Case appeal. Wilmette will argue, however, that—

a) a municipality may, with a properly drawn ordinance, regulate the sale of drug paraphernalia items;
b) if the Hoffman Estates ordinance is found to be constitutional, it is *a fortiori* that Wilmette's regulation of the sale of drug paraphernalia items is constitutional;

c) if the Hoffman Estates ordinance is found not to be constitutional, Wilmette's regulation of the sale of drug paraphernalia items remains valid because Wilmette has adopted an ordinance which is neither vague nor overbroad;
d) if this Court should affirm the decision of the Court of Appeals, the decision of this Court should not jeopardize the enforceability of licensing ordinances which differ from the Hoffman Estates ordinance; and
e) in all events, this Court should, by its decision herein, bring order to the chaotic situation which presently exists in respect of drug paraphernalia ordinances and statutes.

STATEMENT OF THE CASE

The statement of the case as set forth in Appellant's Jurisdictional Statement is adopted by the Village of Wilmette for purposes of this brief amicus curiae.

SUMMARY OF ARGUMENT

Municipalities have the power to regulate the sale of drug paraphernalia items. That power may be exercised in the form of a licensing ordinance.

Licensing ordinances may be drafted in a variety of ways. The ordinance of amicus Village of Wilmette reflects an approach to the problem of defining what constitutes a drug paraphernalia item which is different from the approach taken by Appellant Village of Hoffman Estates.

Wilmette's ordinance is not vague since it gives adequate notice to all concerned of what the law requires and the ordinance does not impermissibly delegate to police officers or to the courts that which is really a legislative responsibility. Because Wilmette's ordinance is not vague, it is not overbroad.

A licensing ordinance need not be as precise as a criminal statute. Since ordinances which absolutely ban drug paraphernalia and impose criminal sanctions for their violation have been upheld, a precise licensing ordinance must be valid.

Because of the lack of uniformity in decisions on this subject, even within the same Federal district, a decision by this Court which contains definite drafting guides is urgently needed.

ARGUMENT

A.

MUNICIPALITIES HAVE THE POWER UNDER THE UNITED STATES CONSTITUTION TO REGULATE THE SALE OF DRUG RELATED DEVICES.

The Federal courts—including even those courts which have struck down drug paraphernalia laws—have repeatedly said either explicitly or in effect that there is no inherent prohibition against the regulation of the sale of drug-related devices. See *Geiger v. City of Eagan*, 618 F.2d 26, 28 (5th Cir. 1980) ("[A city] clearly has the power through a properly drawn ordinance to discourage the availability of drugs and the acceptance of drug use by prohibiting the sale of drug-related devices."); and *The Flipside, Hoffman Estates, Inc. v. Village of Hoffman Estates*, 639 F.2d 373, 377 (7th Cir. 1981) (". . . the village may, with a properly drawn ordinance, regulate drug paraphernalia"); *Cf. Record Revolution No. 6, Inc. v. City of Parma*, 638 F.2d 916, 937 (6th Cir. 1980) ("The regulatory interest of Parma, Lakewood and North Olmsted in stopping drug abuse is plainly substantial").

The recent decision of the Tenth Circuit Court of Appeals in *Hejira Corporation v. MacFarlane*, ... F.2d ..... (10th Cir. 1981) (Slip Opinion) makes this point particularly well:

> "The enactment of drug laws are certainly within the police power of the State . . . [Such laws] go directly to the health, welfare and the public concern for the inhabitants of the State of Colorado. In the General Assembly's exercise of its police power to protect the public health, safety, morals and welfare, the purposes of the Act in question are both constitutionally and logically sound . . . [T]here is a

> nexus between the abuse of controlled substances and the glorification of devices which facilitate such abuse . . . There is a rational relationship between these laws and a legitimate government purpose." (Quoted approvingly from the District Court's opinion, No. 80-F-824, D.Colo. Sept. 5, 1980.)

Wilmette, like many communities in the United States, including particularly those which are located in urban areas, has ample reason to be concerned about drug abuse. When the Corporate Authorities of Wilmette adopted Wilmette's drug paraphernalia ordinance, the President and Board of Trustees were responding to concerns by parents, school administrators and others involved with young people. Drug abuse was and still is perceived as a serious problem; it would be ignoring reality to deal with this subject on any other basis. (Compare *Grayned v. City of Rockford*, 408 U.S. 104, 118 (1972): "We would be ignoring reality if we did not recognize that the public schools in a community are important institutions, and are often the focus of significant grievances.")

B.

WILMETTE HAS BROAD AUTHORITY UNDER ILLINOIS LAW TO ADOPT DRUG PARAPHERNALIA LICENSING REGULATIONS.

Wilmette (like the Village of Hoffman Estates) is a home rule unit of government under Illinois law. Such units of government have direct authority under the Constitution to:

> "exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare; *to license*;" (Illinois Constitution, 1970, Article VII, Section 6(a)) [Emphasis added.]

In exercising this authority with respect to drug paraphernalia items, Wilmette elected to use its *licensing* powers. No attempt was made to *prohibit* the sale of any item of property, except as to minors. Thus, insofar as the basic statutory framework is concerned, Wilmette's treatment of drug paraphernalia dealers is comparable to the treatment of dealers in a variety of other products e.g., liquor retailers, gunsmiths, tobacco dealers, and others, all of whom are required to obtain a license as a condition to conducting business in Wilmette. Wilmette's drug paraphernalia ordinance should not be confused with those statutes or ordinances adopted in other communities or by certain states, including those statutes or ordinances which are based on Drug Enforcement Administration "Model Act", which prohibit the sale, manufacture or possession of drug paraphernalia items, and which make the violation of such statutes or ordinances a crime.

C.

WILMETTE'S ORDINANCE DIFFERS FROM THE HOFFMAN ESTATES ORDINANCE IN SEVERAL IMPORTANT RESPECTS.

Although the Hoffman Estates ordinance may have been the "drafting model" for the first version of Wilmette's ordinance, Wilmette's present ordinance is different from the ordinance presented to the Court in this appeal in several important respects. These differences are as follows:

(1) The Hoffman Estates ordinance uses a two-step process to bring property within the scope of the ordinance: first, the property must be analyzed in terms of a "designed or marketed for use" test, and second, the use must be linked to "illegal cannabis or drugs, as defined by Illinois Revised Sta-

tutes." Wilmette's ordinance involves a different analytical process in arriving at the definition of what is covered. Under the Wilmette approach, property is examined in terms of whether (i) its "primary function" is (ii) to "facilitate the ingestion" of (iii) "cannabis and/or a controlled substance." Wilmette's ordinance, unlike the Hoffman Estates ordinance, then goes on to provide more specific content to these terms.

(2) Under the Wilmette ordinance, "cannabis" and "controlled substances" are tied directly and specifically to the definitions developed by the State of Illinois in the State laws on these subjects.*

(3) The Wilmette ordinance goes on to place certain items within the definition of "drug paraphernalia items" without resort to any analytical process. On the other hand, certain other items are excluded from the ordinance without resort to analysis. The Hoffman Estates ordinance does not use this technique.

(4) In recognition of the fact that there will be a gray area in which further analysis will be required, Wilmette's ordinance provides for a review process which culminates, at the licensee's option, with Wilmette's legislative body. Here, again, no such procedure is found in the Hoffman Estates ordinance.

All of these points of difference have significant implications to the "vagueness" and "overbreadth" prob-

* Thus, "cannabis" means cannabis as defined in the Cannabis Control Act, Ill.Rev.Stat., Ch. 56½, Sec. 701 *et seq.* "Controlled substances" means controlled substances as defined in the Controlled Substance Act, Ill.Rev.Stat., Ch. 56½, Sec. 1101 *et seq.*

lems, discussed below. The point now to be made, however, is that Wilmette's ordinance is different from the Hoffman Estates ordinance in terms of the process used to determine whether an item of property is or is not within the scope of the ordinance.

D.

WILMETTE'S ORDINANCE MEETS THE REQUIREMENTS OF THE VAGUENESS STANDARDS.

The Hoffman Estates ordinance was stricken on the ground that the definition of the subject matter of the ordinance, i.e., the definition of drug paraphernalia items, was so vague as to violate the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution. The standards used by the court in reaching that decision were those set forth in *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972):

> ". . . Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws *give the person of ordinary intelligence a reasonable opportunity to know what is prohibited*, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law *impermissibly delegates basic policy matters* to policemen, judges and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." [Emphasis added].

Wilmette submits that the techniques adopted in its ordinance result in a definition which meets the standards of the *Grayned* case and the 7th Circuit opinion in the Hoffman Estates Case.

(1) Wilmette's Ordinance Gives Fair Notice.

The Hoffman Estates ordinance, like a number of other ordinances found wanting by the courts, has floundered on phrase "designed or marketed for use with illegal drugs." There is no need to discuss herein the several difficulties which the courts have found with that phrase, both in total and in its constituent elements. It will suffice to say that Wilmette has avoided the use of the phrase and has taken a different approach to the problem of advising licensees and prospective licensees as to what is expected of them.

Wilmette's ordinance necessarily starts with a general definitional statement of what constitutes "drug paraphernalia items." As noted above, in drawing the relationship of such items to drugs, reference is made to specific state statutes as to what drugs are relevant, viz., cannabis and controlled substances. Wilmette's ordinance then identifies 12 items which are *deemed* to come within the definition of drug paraphernalia items.

Obviously, in deeming items to be covered by a general definition, the legislative body must not be arbitrary. The list of items deemed to be drug paraphernalia items in Wilmette's ordinance was assembled after reviewing expert authority, including the Model Drug Paraphernalia Act as drafted by the Drug Enforcement Administration of the United States Department of Justice and presentations of local persons familiar with the use of drugs.

A list of "deemed items" could still leave problems under the vagueness tests of *Grayned* if the words used are broad enough to sweep up items which should not be considered as drug paraphernalia items. The courts have repeatedly found fault with drug paraphernalia statutes on this ground, holding that such statutes im-

permissibly swept into their coverage such items as paper clips, spoons, tie bars, etc. See, e.g., the Hoffman Estates Case, 639 F.2d at 381: "Consequently, stocking any item that could possibly be used as a roach clip, such as an alligator clip or bobby pin, could subject a retailer to the licensing requirement." Wilmette has solved this problem by including a category of items which are deemed *not* to be within the ordinance, notwithstanding that ingenious minds could no doubt turn such items into utensils which facilitate the ingestion of drugs. This approach, in effect, gives content to the requirement of the regulations that the *primary function* of a covered item must be to facilitate the ingestion of the defined drugs.

It is submitted that the approach taken in the Wilmette ordinance permits a readily understandable separation between those items which trigger the licensing requirement and those items which do not, and that the true dealer in drug paraphernalia items has been separated from the drug store operator, the hardware dealer, department stores, and other businesses which are not intended to be covered by the ordinance.

The Wilmette ordinance further recognizes the impossibility of listing every single item of property which does or does not come within the regulations. Therefore, as to those items which fall in the gray area between the specifically included and the specifically excluded items, the Wilmette ordinance provides for resolution of the problem on a case by case basis, using certain objective tests prescribed in the ordinance; these tests are: descriptive literature, the marketing procedures being used by the licensee, and expert testimony. Recognizing the inherent difficulties in this gray area, the ordinance goes on to provide for hearing procedures for any licensee or prospective licensee. These hearing procedures

are intended to accord such persons full due process protection.

The Wilmette ordinance uses a further technique to satisfy the requirements of the vagueness tests. Wilmette has recognized the wisdom of Mr. Justice Marshall's phrase in *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972) that "Condemned to the use of words, we can never expect mathematical certainty from our language." Accordingly, Wilmette's ordinance goes beyond linguistic statements of what is deemed to be within the statute and provides for the publication of a pamphlet which will contain at least one photograph of each of the items deemed to be a drug paraphernalia item. It is difficult to see how more certainty can be provided to those who must determine if their activities will be within the licensing requirements.

(2) The Regulations Do Not Impermissibly Delegate Legislative Responsibility.

The second vice noted in *Grayned* in respect of vague statutes is that such statutes impermissibly delegate basic policy matters to policemen, judges and juries. Wilmette's ordinance avoids this infirmity by giving any prospective licensee or licensee the right to take a definitional problem through several administrative reviews and then to the Board of Trustees, which is Wilmette's legislative body. Moreover, the policeman, like the retailer, will be guided by the very specific provisions of the ordinance as described above. Accordingly, Wilmette has avoided the situation found unsatisfactory to a number of courts wherein it is the policeman who, in attempting to enforce an ordinance, is required to make an arbitrary decision as to whether an item is or is not covered by the statute. (See, e.g., *Brache v. County of Westchester*, 507 F. Supp. 566 (S.D.N.Y. 1981).)

E.

WILMETTE'S ORDINANCE IS NOT OVERBROAD.

"A clear and precise enactment may nevertheless be 'overbroad' if in its reach it prohibits constitutionally protected conduct." *Grayned v. City of Rockford*, 408 U.S. 103, 114. The terms used in many statutes and ordinances of "use" or "intended for use", have been held "not vague or overbroad". *The Record Revolution v. City of Parma*, 639 F.2d 916 (6th Cir. 1980).

The Wilmette ordinance is equally specific referring to those things "the primary function of which is to facilitate the ingestion of cannabis and/or a controlled substance," or in other words, "use."

The use of cannabis is surely not "constitutionally protected conduct" since its use or even possession is illegal in Illinois (and the other 49 states, although penalties differ).

Overbreadth was recently considered as "merely a species of the vagueness argument" by the Eighth Circuit Court of Appeals in *Casbah, Inc., et al. v. Thone*, ... F.2d ....., June 8, 1981. When the test of specificity had been met, as the court held there, and we believe is true here, it follows that the ordinance is not overbroad.

Finally, by specifically excluding items from the scope of the ordinance, Wilmette has dealt directly with the overbreadth problem.

F.

LESS PRECISION IS NEEDED IN DEFINITIONS WHICH FORM THE BASIS FOR A LICENSING ORDINANCE.

It cannot be emphasized too strongly that Wilmette's ordinance, like Hoffman Estates' ordinance, requires

only that persons subject to the ordinance must be licensed; no activity is prohibited, except for the sale of drug paraphernalia items to minors. Thus, at most, the violator of the ordinance might be enjoined from carrying on business unless and until the requisite license is obtained or reinstated, but no criminal prosecution is contemplated by the ordinance.

This fact distinguishes the Wilmette and Hoffman Estates approach from the numerous cases which have arisen in respect of statutes or ordinances which prohibit the sale of drug paraphernalia items. Many of these statutes are based upon the Drug Enforcement Administration's "Model Act." That Act makes the intent of the seller a part of offense. As noted in *Brache v. County of Westchester*, 507 F.Supp. 566 (S.D.N.Y. 1981) at p. 577: "The element of scienter necessary to preserve a law from vagueness adds, by definition, another fact for the prosecution to establish by competent evidence. The drafters of the Model Act sought to eliminate vagueness and transferred intent by requiring the requisite elements of knowledge or intent on the part of the manufacturer, seller or user, in order to bring a particular artifact within the definition of "drug paraphernalia."

This approach has led some courts to uphold prohibition statutes and ordinances (e.g., *Hejira Corporation v. MacFarlane*, ... F.2d ..... (10th Cir. May 5, 1981) (Slip Opinion), *Casbah, Inc., et al v. Thone, State of Nebraska, et al*, ... F.2d ..... (8th Cir., June 8, 1981) (Slip Opinion), *Mid-Atlantic Accessories Trade Ass'n v. State of Maryland*, 500 F.Supp. 834 (D.Md. 1980), and *Tobacco Road v. City of Novi*, 490 F.Supp. 537 (E.D.Mich. 1980)). Regardless of the outcome in these cases, the courts were properly concerned with the proposition that the words of a penal statute must be clear and beyond spec-

ulation. See *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939).*

The Supreme Court has observed, in a case involving void for vagueness principles, that "In the field of regulatory statutes governing business activities, where the acts limited are in a narrow category, greater leeway is allowed." *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) (dictum). *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337 (1952), *United States v. National Dairy Products Corp.*, 372 U.S. 29 (1963), and *United States v. Petrillo*, 332 U.S. 1 (1947), were cited in support of the foregoing statement. For a recent application of this principle, see *Shultz v. Securities and Exchange Commission*, 614 F.2d 561, 570-71 (7th Cir. 1980).

Both the Wilmette and Hoffman Estates ordinances are licensing ordinances and thus they regulate those who are consciously in profit making ventures. Such persons are presumed to understand and conform to building, zoning, health, safety and tax regulations, many of which are less specific than the ordinances considered here.

The point to be made is that great care must be taken in analyzing the Hoffman Estates and Wilmette type of ordinance by reference to the principles applicable to criminal statutes. It does not follow that the reasoning of those courts which have invalidated statutes based on the Model Act would necessarily apply so as to invali-

* Special precision is also required for a statute or ordinance which threatens fundamental rights such as free speech. See *Smith v. Gougen*, 415 U.S. 566, 572-73 (1974). It is inconceivable that the sale of drug-related devices involves free speech or other First Amendment considerations. See Point E, *supra*.

date a licensing statute. (It would seem, however, that those courts which have sustained statutes based on the Model Act would, *a fortiori*, hold Wilmette's ordinance valid and perhaps, also, the Hoffman Estates ordinance.)

The foregoing is not an argument that free rein may be taken by a legislative body in the drafting of licensing statutes. Wilmette does not quarrel with the proposition that if a licensing ordinance does not give adequate warning of the activity which would lead to license revocation, the ordinance is invalid. *Houseworth v. Glisson*, 485 F.Supp. 29 (N.D. Ga. 1978), *aff'd* 614 F.2d 1295 (5th Cir. 1980). Neither does Wilmette quarrel with the proposition stated in a footnote in the *Hoffman Estates* Case that "There are obvious differences between *revoking* a license on the basis of inadequately defined conduct and *requiring* a license in order to engage in the conduct. But in both cases, because of the retailer's constitutionally protected interest in his business, the ordinance must be drawn clearly enough to warn a retailer of what the law requires." 639 F.2d at 378, n. 12. It is important to remember, however, the point made in *Rose v. Locke*, 423 U.S. 48, 49-50 (1975):

> "It is settled that the fair-warning requirement embodied in the Due Process Clause prohibits the States from holding an individual 'criminally responsible for conduct which he could not reasonably understand to be proscribed.' [citations omitted]. But this prohibition against excessive vagueness does not invalidate every statute which a reviewing court believes could have been drafted with greater precision. Many statutes will have some inherent vagueness, for '[i]n most English words and phrases there lurk uncertainties.' [citations omitted]. Even trained lawyers may find it necessary to consult legal dictionaries, treatises, and judicial opinions

> before they may say with any certainty what some statutes may compel or forbid. . . . All the Due Process Clause requires is that the law give sufficient warning that men may conduct themselves so as to avoid that which is forbidden."

The foregoing statement was a prelude to the holding that a Tennessee statute which prohibited "crimes against nature" was not unconstitutionally vague. Noting that the phrase had been in use among English-speaking people for many centuries, the court felt that "Anyone who cared to do so could reasonably determine what particular acts have been considered crimes against nature. . . ." 423 U.S. at 50. By the same token, the items deemed to be drug paraphernalia items in Wilmette's ordinance, while perhaps not known as such for many centuries, are certainly well known to anyone even mildly conversant with drug-related devices, and any businessman, who cares to do so can certainly determine whether his wares will be considered "drug paraphernalia items" under Wilmette's ordinance.

Warning the party affected of "what the law requires" is the crux of both the prohibition statutes and the licensing statutes insofar as the requirements of due process are concerned. The point still remains, however, that somewhat more latitude should be allowed where language which may be less than perfectly precise appears in a licensing statute as opposed to a criminal statute. Wilmette submits that the Hoffman Estates ordinance (and its own ordinance) should be evaluated in that light.

CONCLUSION

The purpose of this amicus curiae brief has not been to urge this Court to reverse the Seventh Circuit Court of Appeals and to sustain the validity of the Hoffman Estates ordinance. Although Wilmette considers that result to be the proper one, the argument to that end will be ably made by Hoffman Estates' own counsel.

This brief has been filed to make the point that even if the ordinance now before the Court should be struck down, the Court's opinion need not and should not stand as a general condemnation of statutes and ordinances which subject dealers in drug paraphernalia to licensing requirements.

It would be presumptuous for Wilmette to claim that it has acopted a model licensing ordinance. Wilmette believes that it has adopted an ordinance which tells all concerned "what the law requires" and Wilmette can without hesitation claim to have made a bona fide effort to draft an ordinance which satisfies the vagueness and overbreadth standards established by the courts. If, despite Wilmette's best efforts, the Court's opinion in this case is such as to place Wilmette's ordinance in jeopardy, then Wilmette submits that it is also the Court's responsibility to tell communities such as Wilmette just what is required of them. To do less than that would render hollow the statement which repeatedly appears in the decisions of the lower courts, including the Seventh Circuit Court of Appeals in this case,*

* Quoting from *Geiger v. City of Eagan*, the Seventh Circuit Court of Appeals said: ". . . a city 'clearly has the power through a properly drawn ordinance to discourage the availability of drugs and the acceptance of drug use by prohibiting the sale of drug-related devices'." 639 F.2d at 377.

that municipalities have the power to regulate the sale of drug paraphernalia items under properly drawn ordinances. It is of little consolation to communities which are concerned with problems of drug abuse to be told that in theory they have the power to act when in practice the power cannot be exercised.

Any student of drug paraphernalia statutes and ordinances knows that the law in this area is presently in a chaotic condition.* Wilmette urges the Supreme Court to take advantage of this case to indicate with specificity what is required for a constitutional drug paraphernalia licensing ordinance.

Respectfully submitted,

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July 16, 1981

* A clear example of the chaos is the Southern Division of the Eastern District of Michigan. In the same division, identical ordinances were treated in opposite ways. *Tobacco Road v. City of Novi*, 490 F.Supp. 539 upheld ordinance; *Music Stop, Inc. v. City of Ferndale*, 488 F.Supp. 390, held ordinance unconstitutional.

APPENDIX

WILMETTE VILLAGE CODE

CHAPTER 11

RESTRICTIONS AND PROHIBITIONS RELATING TO SMOKING PARAPHERNALIA IN GENERAL AND TO ITEMS DESIGNED AND MARKETED FOR USE WITH CANNABIS OR DRUGS

11-1 PROHIBITION OF THE SALE OF SMOKING PARAPHERNALIA TO MINORS.

11-1.1 The sale, barter, gift or exchange of cigarettes, cigars, pipe tobacco, all types of pipes, cigarette papers, and all other materials used for smoking, including, but not limited to, all types of smoking paraphernalia, is hereby prohibited to persons seventeen (17) years of age or under.

11-2 LICENSING THE SALE OF ITEMS DESIGNED OR MARKETED FOR USE WITH CANNABIS OR DRUGS AND PROHIBITING THEIR DISPLAY.

11-2.1 *Definitions.* (a) The term "Drug Paraphernalia Item" means any device, contrivance, effect, accessory or thing whose primary function is to facilitate the ingestion of cannabis and/or a controlled substance.

(b) The following items are deemed to meet the standard set forth in paragraph (a), and the following items are therefore "Drug Paraphernalia Items" within the meaning of this ordinance:

(1) carburetion tubes and devices;
(2) smoking and carburetion marks;
(3) roach clips;
(4) separation gins;
(5) cocaine spoons and vials;
(6) chamber pipes;
(7) carburetor pipes;
(8) electric pipes;
(9) air driven pipes;

(10) chilams;
(11) bongs; and
(12) ice pipes or chillers.

The Village shall prepare and make available to each licensee or prospective licensee a pamphlet which contains at least one photograph of each of the 12 items listed in this paragraph (b)

(c) The following items are deemed not to meet the standard set forth in paragraph (a), and the following items are therefore not "Drug Paraphernalia Items" within the meaning of this ordinance:

(1) paper clips
(2) tie bars
(3) hand mirrors
(4) spoons
(5) pieces of aluminum foil.

(d) The status of items which may not clearly come within the categories set forth in paragraphs (b) and (c) shall be determined by the municipal authorities on a case-by-case basis in accordance with the standard set forth in paragraph (a) and in accordance with the procedures set forth in other sections of this ordinance.

(e) In applying the phrase "primary function is to facilitate the ingestion of cannabis and/or a controlled substance" to any item, the municipal authorities shall take into account the following matters, to the extent reasonably available: (i) descriptive literature furnished by the designer or manufacturer or wholesaler of the item; (ii) the marketing procedures used by the licensee with respect to the item, including in particular the proximity of the item to Drug Paraphernalia Items or to literature which encourages the use of cannabis or controlled substances; and (iii) testimony from experts on the use of cannabis or controlled substances.

(f) The term "cannabis" means cannabis as defined in the Cannabis Control Act (Ill. Rev. Stat., Ch. 56½, Sec. 701 et seq.)

(g) The term "controlled substance" means controlled substance as defined in the Controlled Substance Act (Ill. Rev. Stat., Ch. 56½, Sec. 1101 et seq.)

11-2.2 *License Required.* It shall be unlawful for any business enterprise, whether organized as a corporation, partnership, sole proprietorship or otherwise, to sell or offer for sale in the Village any Drug Paraphernalia Item without having a license therefor or in violation of the terms of such license.

11-2.3 *License Applications.* (a) An application for a license to sell Drug Paraphernalia Items shall be made to the Village Clerk, shall be signed by the applicant and shall contain the following information:

(1) The address of each location within the Village where the applicant proposes to sell Drug Paraphernalia Items;

(2) The length of time in which the applicant has been in the business of selling Drug Paraphernalia Items;

(3) In the case of an applicant who is an individual, the applicant's name, age and home address;

(4) In the case of an applicant which is a partnership, list of the persons entitled to share in the profits therefrom, the address of the partnership's principal office, and, as an attachment to the application, a true copy of the articles of partnership and all amendments thereto:

(5) In the case of an applicant which is a corporation, a list of the names and addresses of the officers, the directors and each person who owns, directly or indirectly, more than 5% of the stock of such corporation, and, as an attachment to the application, a true copy of the articles of incorporation and all amendments thereto;

(6) The name and home address of the person who will serve as manager of each location identified under item (a);

(b) Each application for a license submitted pursuant to paragraph (a) above shall be accompanied by affidavits signed, respectively, by each of the persons identified under items (3), (4) or (5) that such person has never been convicted of a drug-related offense.

(c) Each application for a license submitted pursuant to paragraph (a) above shall be accompanied by a check for $150 in payment of the initial fee for such license.

11-2.4 *Term.* Each license issued under this Chapter 11 shall terminate one year from the date of issuance. Renewal applications shall be submitted not less than 30 days prior to the expiration of the license. Each renewal application shall be accompanied by a check for $150 in payment of the renewal fee for such license. In addition, each renewal application shall be accompanied by a statement that either there are no changes in the information then on file with the Village in connection with Section 11-2.3 or, if any changes have occurred, a description of the changes.

11-2.5 *Conditions to Continuing Effectiveness of Licenses.* Notwithstanding Section 11-2.4, each holder of a license issued pursuant to this Chapter 11 shall, as a condition to the continuing effectiveness of such license, furnish the following information to the Village Clerk:

(1) An affidavit signed by each employee of the licensee to the effect that such employee has never been convicted of a drug-related offense. Such affidavit shall be submitted within seven days after the employee has been employed by the licensee.

(2) A notice of any changes in the information previously submitted under items (3), (4), (5) or (6) of Section 11-2.3(a). Such notice shall be given within seven days after the occurrence of the event which requires the notice to be given. Whenever the notice identifies a new person for inclusion in the list of persons required under items (3), (4) or (5) of Section 11-2.3(a), the notice shall be accompanied by an affidavit from such person in the form described in Section 11-2.4(b).

11-2.6 *Sales by Minors.* It shall be unlawful for any licensee to permit any person under 18 years of age to sell or give any drug paraphernalia item in a licensed establishment.

11-2.7 *Sales to Minors.* It shall be unlawful to sell or give any Drug Paraphernalia Item to any person under 18 years of age.

11-2.8 *Records.* Every licensee must keep a record of every item, effect, paraphernalia, accessory or thing which is designed or marketed for use with cannabis or drugs which is sold and this record shall be open to the inspection of any police officer at any time during the hours of business. Such record shall contain the name and address of the purchaser, the name and quantity of the product, the date and time of the sale, and the licensee or agent of the licensee's signature. Such records shall be retained for not less than two (2) years.

11-2.9 *Display.* It shall be unlawful to publicly display in any business establishment within the Village of Wilmette which permits persons under the age of eighteen (18) years to enter into its place of business any Drug Paraphernalia Items, effects, accessories or things designed or marketed for use with cannabis or drugs as defined in Section 11-2.1.

11-2.10 *Hearing Procedures.* (a) The determination as to whether any device, contrivance, effect, accessory or thing is a Drug Paraphernalia Item shall be made initially by the Chief of Police. Any licensee or prospective licensee who disagrees with the determination made by the Chief of Police may request a hearing on the matter. Said hearing shall be conducted by the Judiciary committee of the Board of Trustees. The hearing shall be held upon not less than five days' notice to the public and to the licensee or prospective licensee. The Judiciary Committee may continue the hearing from time to time without further notices except by public announcement at the hearing and the entry of the continuation in the minutes of the hearing.

(b) At any hearing held by the Judiciary Committee, a record of the proceedings shall be kept. The Judiciary Committee shall take evidence from the licensee or prospective licensee and from the Chief of Police and may take evidence from such other persons as the Committee sees fit. The Committee shall prepare a report of its findings of fact and its conclusions and transmit copies thereof to the licensee or prospective licensee and to the Board of Trustees.

(c) Final action on the matter shall be taken by the Board of Trustees. The action of the Board of Trustees shall be a final administrative determination and shall be subject to judicial review in accordance with applicable Illinois statutes.

11-3 SEVERABILITY. If any word, phrase, clause, sentence, paragraph, section or sub-section of Chapter 11 of the Wilmette Village Code is found to be invalid, this shall not affect the validity of the remaining words, phrases, clauses, sentences, paragraphs, sections or subsections.

11-4 PENALTY. The penalty for violation of any provision of this Chapter 11 shall be as set forth in Section 1-12.1 of the Wilmette Village Code.

11-5 REVOCATION OF LICENSE. The Village Manager shall have the authority to revoke all licenses and permits issued to any person who violates any provision to this Chapter 11. He shall establish rules and regulations to provide a fair hearing prior to any such revocation. The revocation of a license or permit shall not bar any other enforcement procedure and shall not bar the imposition of a fine.